

How Utah Resolves Eminent Domain Disputes And Protects Private Property Rights (in Six Easy Steps)

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by

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Introduction – A Real-World Procedure

While the following description about how property rights disputes are resolved in Utah may seem far-fetched and unlikely to succeed in the real world of condemnation practice, it has been proved effective over a nine-year experience. As of the time of this summary, in March of 2007, legislation to enact a similar office is pending in Congress. Legislation to create an ombudsman has been proposed in the legislature in New York. Connecticut followed the lead of the State of Utah by creating the office in 2006. The Federal, Connecticut and Utah positions follow the same basic format outlined here.

The Utah Legislature created the Office of the Property Rights Ombudsman (OPRO) in 1997. After seven years of evolving experience, the 2004 legislature codified the practices outlined here.¹ Not only is the following procedure accepted now in Utah, the legislation that mandates it passed both houses of the Utah Legislature without a single negative vote from either side of the aisle. What follows is a practical process developed over ten years and several thousand real-world transactions. Until 2006 there was only one attorney in the office. That year the Utah legislature tripled the budget of the office, quadrupled the staff to four, and expanded its mission to involve a comprehensive responsibility to resolve planning and zoning issues statewide.

A prime mission of the OPRO remains the resolution of eminent domain disputes, however. According to officials of the Utah Department of Transportation, the percentage of its negotiations for the acquisition of property for public projects that fail and result in litigation against property owners has dropped by more than 75% as a result of the procedures outlined here.²

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¹ Senate Bill 9, 2004 Utah Legislature, can be viewed at the legislative web site found at www.utah.gov. See also Session Laws of Utah 2004, Chap. 233, §10.

² Comments by Lyle McMillan, Director of Property and Right of Way, Utah Department of Transportation at the Utah Land Use Institute, October 4, 2004.

The Office of Property Rights Ombudsman

The Utah model relies on a gatekeeper who is accessible to the public through a toll-free number, email and a website.³ The office is staffed with attorneys experienced in land use, eminent domain, and relocation assistance. There is no charge for its services. The office's function is to answer questions of both property owners and agency officials and to resolve disputes.

Definitions: Ombudsperson

“An ombudsperson serves as an alternative to the adversary system for resolving disputes, especially between citizens and government agencies . . . An ombudsperson is . . . (1) an independent and nonpartisan officer of the legislature who supervises the administration; (2) one who deals with specific complaints from the public against administrative injustice and maladministration; and (3) one who has the power to investigate, criticize and publicize, but not to reverse administration action.”⁴

Definitions: Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is the use of a third party neutral to bring parties to a settlement and avoid litigation. ADR always involves a third party neutral. It is a step beyond negotiation, and includes various options for dispute resolution involving a third party such as conciliation, facilitated negotiation, mediation, and arbitration. The third party neutral has no financial interest in the substance of the outcome. ADR *always* involves a third party neutral. The best neutrals are knowledgeable in the area of expertise that the dispute involves and also skilled and experienced in negotiation and settlement techniques.

The Procedure in Six Easy Steps

One: An *Independent* Property Rights Ombudsperson

If a viable ADR program is going to work, it is essential that a full-time neutral be appointed whose sole job is to facilitate the resolution of disputes. In Utah those persons work in the OPRO. The essential characteristics of the office found in the Utah model are:

- a. The OPRO is staffed with attorneys with extensive experience in property rights.
- b. Information about the OPRO must be disclosed to property owners when they are contacted about the acquisition of property for public projects.⁵ Adequate means must be provided to ensure that property owners know that there is a free and independent source of advice.
- c. An attorney from the OPRO answers the phone or calls back when people call. The attorneys are not buffered by paralegals and assistants-to. Calls are returned within 24 hours whenever possible. The latest technology is used to enhance communications.
- d. The OPRO is independent of the attorney general and other agency attorneys. Although housed in the administration of the Department of Commerce, the office is separately funded in the budget, approved as a line item by the legislature.

³ propertyrights.utah.gov

⁴ 4 Am.Jur. 2d. Alternative Dispute Resolution §23 (1995).

⁵ Utah Code Annotated §78-34-4.5.

- e. The OPRO can assist with property rights disputes between property owners and any state or local government entity.⁶ Its services are not limited to state agencies, and can assist with disputes involving cities, counties, school districts, utilities, and other entities that have the power to regulate property or use eminent domain.
- f. The OPRO can also deal with issues beyond the matter of just compensation. Property owners can ask for our help with issues such as regulatory takings, the right to condemn property, relocation assistance, and other condemnation-related questions.⁷
- g. The OPRO has investigatory powers and is able to subpoena information from agencies under the Utah Uniform Arbitration Act.⁸ We have statutory standing to intervene in litigation, if necessary, for the sole purpose of making a motion to stay the proceedings in cases where the OPRO determines that property owners are severely disadvantaged by an aggressive agency litigation process.⁹
- h. The OPRO spends a lot of time training and writing materials to inform citizens and agencies of the law. We maintain a web site, sponsors an annual conference and uses other public outreach efforts. Our attorneys are members of a number of associations where they network with agency officials.
- i. There is no charge for the eminent domain-related services of the OPRO.
- j. The OPRO's involvement is triggered by the property owner, not the agency.¹⁰ This builds credibility in the office which, since it is funded by the government, would normally be perceived as serving primarily the interests of the government.
- k. Either party, especially the agency involved, can veto the use of the OPRO as a neutral and insist that another neutral be appointed to resolve the dispute.¹¹ This preserves credibility with the government agencies involved. In such a case, the party demanding another neutral pays for the cost of the neutral.
- l. The OPRO has the power to decline to pursue ADR if we determine that the property owner's request is inappropriate, either because the matter is not ripe for resolution, does not involve eminent domain or a "taking" question as defined by relevant law, or would otherwise be unfair or counterproductive to either party.¹²

Two: The First Alternative to Negotiation

ADR is the first alternative to negotiation in Utah eminent domain procedures. Litigation is not to be used to resolve an eminent domain dispute over the objection of property owners unless absolutely necessary. The OPRO has the power to require that the condemning agency

⁶ U.C.A. §13-43-203(1)(d).

⁷ U.C.A. §13-43-204(1), §78-34-21 (Eminent Domain), §57-12-14 (Relocation Assistance).

⁸ U.C.A. §78-31a-101 et seq.

⁹ U.C.A. §78-34-21.

¹⁰ U.C.A. §13-43-204(1).

¹¹ U.C.A. §13-43-204(3)(c).

¹² U.C.A. §13-43-204(3)(b).

participate in ADR if we make a determination that ADR is an appropriate and viable means of resolving the dispute.¹³

- a. The goal of ADR and the OPRO is *not* to achieve a different result than litigation would achieve, but to do so in a manner that is faster, friendlier, fairer, less expensive, and which results in a permanent settlement that stays in place without appeals. Because the rules tend to favor government entities anyway, delegating the dispute resolution to the OPRO, which respects and follows the rules should not be difficult for government. As a safeguard against abuse by the OPRO, both sides have some veto power over who the neutral is and either may opt not to use the OPRO if another neutral is preferred.¹⁴
- b. The OPRO seeks to conciliate between the parties before a three-way meeting is held. Where possible, a conference call is used rather than a face-to-face meeting. If mediation will solve the problem, arbitration is not arranged. The quickest, least intrusive and most economical method is used so that both parties save time, hassle and cost.
- c. The ADR process need not be binding to be effective. Although the OPRO can order arbitration and the government entity involved must participate if he or she does, the procedure used in Utah does not involve binding arbitration. Arbitration awards through the Utah OPRO process, absent an agreement to the contrary, can be appealed *de novo* within 30 days by either party, much like a small claims court judgment.¹⁵ Appeals rarely happen, since the arbitration process is even-handed, fair, directed by the parties and based on the same law and evidence that would be used in a courtroom. Not once in its ten year history has an arbitration award been reviewed, much less set aside, by a court.
- d. Although the OPRO is involved extensively in ADR processes outside of arbitration, we do not act as the arbitrator when arbitration is appropriate. If an OPRO attorney has been involved in ex parte communications about the matter with each party outside of the presence of the other party, he or she cannot and should not arbitrate the matter. He or she can act to set up a fair arbitration process, but another attorney in the OPRO or an outside neutral should be the arbitrator. A list of approved neutrals is also maintained by the office that can be suggested to the parties, but the parties may choose any individual they wish to use so long as the fees involved are paid by the parties.
- e. An essential factor in the Utah success is that arbitration, if necessary, is set up on a case-by-case basis. Where possible, volunteers serving in a three-person panel are appointed to hear cases about valuation. Hearings are kept short and efficient. The OPRO staffs such arbitrations and assists with the mechanics of the process, but is not the decision maker on issues of value.

Three: Property Owners are Treated With Dignity

Agencies treat property owners with dignity as equal partners in ADR.

- a. Property owners must understand their rights. A simple outline of property rights is provided by the OPRO and the office consults extensively with the parties, answering questions and sending information to make sure all involved make informed decisions.

¹³ U.C.A. §13-43-204(2).

¹⁴ U.C.A. §13-43-204(3)(c).

¹⁵ U.C.A. §13-43-204(3)(i).

- b. Government agencies must share with property owners all the information they have about the project and the value of the property involved. The appraisals, the project information, and even the amount paid to other property owners and the appraisals completed on the other properties must be shared if a property owner asks to see them.¹⁶
- c. Agencies must comply scrupulously with the relevant open meetings and open records act and do nothing that would give anyone the impression that as an agency it has anything to hide.¹⁷ The OPRO publishes a handbook on Utah's open meetings and records laws to better inform all involved about the need for disclosures.
- d. Under the 2004 statute, agencies must fully disclose the dispute resolution options during negotiations and let the property owner choose the method he or she wants to use. Property owners also are told how to contact the OPRO.¹⁸ The OPRO can then guide both parties to choose the appropriate ADR tool, whether conciliation, mediation, arbitration or a variety of these.

Four: Agencies Let the OPRO Do the Job

When the OPRO is called in, agencies let it act as the go-between facilitator to bring about a solution.

- a. Attorneys appointed to serve in the OPRO must be knowledgeable and credible and work to be sure that their approach is acceptable to both sides.
- b. The OPRO makes sure the parties know and respect the ground rules laid down by the courts and statutes. Everyone needs to know how eminent domain disputes are resolved under the relevant law. The OPRO seeks solutions within the existing law unless both parties wish to be more creative and seek an alternate and more innovative resolution.
- c. The parties use the OPRO early and often in flexible formats, such as shuttle diplomacy, conference calls, conciliation efforts, and segmented arbitration.
- d. The OPRO and the parties need not make the process complicated. The OPRO does not usually try to get the parties to sign agreements and settlement process forms before mediation. Progress is usually made as soon as the OPRO starts making phone calls and attempts to solve problems without front-loading a lot of paper work and formality. Sometimes all it takes is phone calls and free exchange of information. The author has mediated more than a hundred disputes where he has never even met the parties face to face.
- e. If the OPRO can't broker a solution, it will work to develop a road map to a solution. The OPRO can break the problem into bite size pieces and even mediate the mediation process.

Five: Everyone is Equal at the Table

The OPRO works creatively to make sure that everyone comes to the table as equals in ADR. The means to do this may sound expensive, but they can generate a significant payback in good

¹⁶ U.C.A. §63-2-304(7).

¹⁷ Government Records: U.C.A. §63-2-101 et seq. Open Meetings: U.C.A. §52-4-1 et seq.

¹⁸ U.C.A. §78-34-4.5.

will and efficiencies as the parties work together. *These devices do not cost agencies more than litigation, and one court case avoided can pay for ten or fifty efforts to resolve disputes through ADR.*

- a. A major problem in the traditional eminent domain process is that when there is no agreement as to value the proposed project may stall. This urgency usually forces the agency to file a lawsuit against the property owner to get possession of the property. In Utah, where only part of the property is needed for the project and there is no displacement of the property owner, the OPRO works to assist the agencies to negotiate an agreement for occupancy rather than file a “quick take” legal proceeding. This is not only cheaper, but it saves everyone time and hassle and stops the drawing of lines in the sand. The OPRO can achieve a mediated arrangement for possession of the property in a great percentage of the cases, though not always. Sometimes the property owner will not mediate and the litigation must be commenced.
- b. If reasonably necessary to resolve a dispute, the OPRO can also order the agency involved to pay for a second appraisal using an appraiser of the property owner’s choice.¹⁹ The OPRO does not impose a list of eligible appraisers or exercise veto power over the property owner’s choice of appraisers. He or she lets the system work – again, on the merits – and only determines if the appraiser the owner has chosen is independent and will charge a reasonable fee to do the work in a reasonable time. This free second appraisal process provides a major incentive to bring the property owner to the table as well as a means to equalize the information that both parties bring to ADR. It strengthens the credibility of the process and acts as a very powerful reality check on the government’s appraised value.
- c. The OPRO acts independently as a gatekeeper who can also provide a check and balance on the process and the evidence. The OPRO is allowed to speak freely in favor of property rights so property owners know it is not biased against them, but attorneys in the OPRO must not misrepresent what the law says and how it is applied in the process of acquiring land for public projects. Thus the OPRO can maintain credibility with the agency officials as well.
- d. The process is not meant to suggest that property owners must avoid lawyers. The OPRO allows full participation by counsel for either party. Experience has shown that much of the value of the OPRO is that it is available to advise counsel for a property owner when that counsel is unfamiliar with the specifics of the law of property rights. With more information, attorneys for property owners are not as likely to make unfounded claims or form unreasonable expectations.

Six: Keep it Simple

When the time comes to meet in mediation or arbitration, the OPRO does not make the process any more formal than it has to be. The parties can sit around a table with an OPRO attorney and the appraisers or other experts, have a conversation and work out a deal or inform the arbitrator so he or she can make a decision on the merits. Each appraiser can tell his or her story without formal cross-examination. This does not eliminate the due process right to cross-examine, but just takes the formality away. Each party’s right to cross-examine is used in conversational style,

¹⁹ This provision in statute does not apply to regulatory takings, but only to eminent domain and relocation assistance issues. See U.C.A. §78-34-21 (Eminent Domain) and U.C.A. §57-12-14 (Relocation Assistance).

not as it would be conducted on the witness stand in a hostile proceeding. Neither side “lawyers” the matter any more than absolutely necessary.

We have found it to be essential that the OPRO staff reads, internalizes, applies and preaches the principles of Getting to Yes²⁰:

1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Invent options for mutual gain.
4. Insist in using objective criteria.

Conclusion

This may all seem far-fetched and unrealistic to the casual reader who first comes in contact with the philosophy and procedure described here. That is understandable. However, in Utah where this concept has been incubated for ten years, we have found dramatic reductions in the necessity for condemnation actions and significant improvements in the ongoing relationships between property owners and government officials after property is acquired.

The use of the OPRO and ADR is not necessary for every property owner whose land is needed for a public project or who is affected by regulation, or even for most property owners. Most negotiations for the acquisition of land do not result in extended disputes and the Utah model is not used to interfere with the acquisition of property from willing sellers. Most of the time, property owners sign during the negotiation process or resolve any questions they have about regulations with the agency officials involved and never call the OPRO.

But the OPRO and ADR holds great promise for those property owners who are:

- unsure of themselves,
- skeptical about the information given them,
- so naturally eager to wheel and deal that they need some formality to bring the process to conclusion, or
- hostile to the process entirely but rational once a credible system is in place to resolve the dispute on the merits through a third party.

Great opportunities exist to resolve disputes through ADR. If negotiation is not working, the OPRO can solve a lot of problems before the agency has to pull the plug and go to court. In America, where this corner of the relationship between citizens and government involves basic constitutional rights, it is appropriate to proceed with courtesy and respect. Experience has shown that the returns on these practices and philosophies can be significant, saving time, money, and hassle for all involved.

Questions and comments about the procedures and practices outlined here are welcome. Please contact the Utah Property Rights Ombudsman toll free at 1-877-882-4662 or by email at propertyrights@utah.gov.

²⁰ Roger Fisher and William L. Ury, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, (2d Ed, Penguin Books, 1991).

Dispute Resolution in Eminent Domain
Relevant Statutory References – Utah Code Annotated
(As amended in the 2006 General Session by Senate Bill 268)

Code Section	Subject
§ 13-43-101 thru 206	Office of the Property Rights Ombudsman
§ 78-34-4.5	Negotiation and Disclosures Required Before Condemnation
§ 78-34-21	Eminent Domain Dispute Resolution – Second Appraisal
§ 57-12-14	Relocation Dispute Resolution – Second Appraisal
§ 63-2-304(7)	Appraisals Must be Disclosed to Homeowners